THE EXCLUSIVE POWER OF CONGRESS TO REGULATE INTERSTATE AND FOREIGN COMMERCE.

The power of Congress, under the Constitution,[1] to regulate commerce among the several States and with foreign nations, covers a field of legislation of vast extent. The power extends to the regulation not only of the transaction *per se*, but of all its incidents,—the commodity or passenger which is its subject, the instrument by which it is effected, the personal agent who performs it.[2] It is a power complete in itself, may be exercised to its fullest extent and acknowledges no limitations, other than are prescribed in the Constitution.[3] The dual nature of our national system, as composed of States possessing attributes of sovereignty within the Union, imposes no restraints upon Congress when legislating pursuant to its commercial power; for this power is vested in Congress as absolutely as it would be in a unitary government which had in its Constitution only those express restrictions upon the power which are found in the federal Constitution.[4] And the power to regulate commerce expressly granted draws after it, by necessary implication and under the terms of the Constitution, the power to use all means which are necessary and proper to effect the desired regulation.[5] The necessity of resorting to particular means, and the appropriateness of the means, are questions for Congress, not for the courts.[6]

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[1] "The Congress shall have Power * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Const. Art. 1. Sec. 8. par. 4

[2] Welton *v.* Missouri (1876) 1 Otto 275; Pensacola Telegraph Co. *v.* W. U. Telegraph Co. (1878) 6 Otto 124; Gloucester Ferry Co. *v.* Pennsylvania (1885) 114 U. S. 196.

[3] Gibbons *v.* Ogden (1824) 9 Wheat. 1.

[4] Gibbons *v.* Ogden (cited); The Brig William (1808); 2 Hall's Law Journal, 255.

[5] "The Congress shall have power * * To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof." Const. Art. 1, Sec. 8, par. 18; U. S. *v.* Fisher (U. S. 1818) 2 Cranch. 358; M'Culloch *v.* Maryland (1819) 4 Wheat. 316.

[6] M'Culloch *v.* Maryland (1819) 4 Wheat. 316.

In a sense this power of commercial regulation is exclusively in Congress throughout its great extent; for once Congress has legislated upon any subject under this power, then conflicting legislation by a State becomes void, however proper that legislation might otherwise be.[1] For the Constitution and the laws of the United States made in pursuance thereof are the supreme laws of the land, anything in the constitution or laws of any State to the contrary notwithstanding.[2] But in the more common use of the term, which is that hereafter employed, the "exclusive power of Congress to regulate interstate and foreign commerce" signifies that the mere constitutional grant, the dormant or inchoate power even before it is exercised, deprives the States of the power to regulate certain subjects of commerce. As to these subjects the power of Congress is exclusive in a strict technical sense. But as to other subjects it is not the mere grant of the power to Congress, but the conflict between specific legislation by Congress and by a State which renders the latter void; and as to those subjects the States possess power of legislation, which is described as concurrent with the power of Congress over the same subjects. There is therefore much need of a rule to determine as to what subjects the power of Congress is exclusive of and as to what it is concurrent with power in the States. For if, on the one hand, the States were admitted to concurrent legislation upon all subjects connected with inter-state and foreign commerce, the efforts of the States to favor their own citizens and industries, and the conflict of retaliatory legislation of different States, would destroy the commercial freedom and equality which it was a principal object of the federal constitution to attain, and re-introduce the intolerable confusion and exactions of the period following the Revolution; and if, on the other hand, the States were deprived of the right to legislate upon all subjects connected with that commerce, local self government and the autonomy of the States would become illusory.

But though the need of a rule was great it was not

[1] Gibbons *v.* Ogden (1824) 9 Wheat. 1; Brown *v.* Maryland (1827) 12 Wheat. 419; New York *v.* Miln (1837) 11 Peters, 102.

[2] Const. Art. VI. par. 2.

announced until twenty-seven years after the first case reached the Supreme Court. Marshall left the question undecided.[1] After his death the opinions of the justices were irreconcilable, and the judges on the opposite sides of the controversy seem to have been able neither clearly to define their own nor clearly to understand their opponents' uses of the terms, exclusive and concurrent powers.[2] A workable rule was not arrived at by the court until the celebrated opinion of Mr. Justice Curtis in the cases of Cooley *v.* Board of Wardens of the Port of Philadelphia in 1851.[3]

These cases raised the question whether certain laws of the State of Pennsylvania relating to the regulation of the pilotage of vessels arriving at and departing from ports of that State were repugnant to the commercial clause of the Constitution, and required the court to decide "whether the grant of the commercial power to Congress did, *per se*, deprive the States of all power to regulate pilots." The majority of the court, speaking by Mr. Justice Curtis, upheld the validity of the State laws, and laid down the following rules to determine when the power of Congress is and when it is not exclusive:

Whether the power of Congress to legislate upon a given subject under the commercial clause of the Constitution is or is not exclusive, depends upon the nature of the subject.

Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of

[1] In Gibbons *v.* Ogden (1824) 9 Wheat. 1, Marshall noticed, but refused to decide, appellants' contention that the power of Congress was exclusive; putting his decision upon the ground of conflict between laws of Congress relating to the coastwise trade and the laws of the State of New York in question. He decided Brown *v.* Maryland (1827) 12 Wheat. 419, because of conflict between a law of Congress and of the State, and in Willson *v.* Black Bird Creek Marsh Co. (1829) 2 Peters 245, sustained the law of the State upon the ground that Congress had not legislated on the matter. Judge Story is in error, both in his Commentaries on the Constitution (Sec. 1067) and in his dissenting opinion in New York *v.* Miln (1837) 11 Peters 102, in saying that Gibbons *v.* Ogden had settled that the power of Congress was exclusive.

[2] See New York *v.* Miln (1837) 11 Pet. 102; Groves *v.* Slaughter (1841) 15 Pet. 449; The License Cases (1847) 5 How. 504; The Passenger Cases (1849) 7 How. 233, for examples of diverse views in the Supreme Court upon the question of the exclusive power of Congress.

[3] (1851) 12 Howard U. S. 299 (two cases).

regulation, are of such a nature as to require exclusive legislation by Congress.

Whatever subjects of the power are in their nature local and not national, and are such as may be best provided for by different systems of regulation enacted by the State in conformity with circumstances existing within their limits, may, in the absence of legislation by Congress, be regulated by the States.

And the opinion is an authority for the proposition that, not the mere legislation by Congress upon a local subject, but the direct conflict between the law of the Congress and the law of the State, renders the latter void.

Judge Curtis says that the opinion is intended to be confined to the precise question of pilotage then before the Court, but the reaffirmation of the rules in many cases upon a variety of commercial subjects has long since determined them to be of very general application.[1]

The influence of the rules has been so great and Judge Curtis' exposition of principles is so luminous as to justify the following extracts from his opinion. After noting that the cases presented directly to the Court the question whether the grant of the commercial power to Congress did *per se* deprive the States of all power to regulate pilots, he continues:

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[1] For example: Upon the question of tax on land transportation in Crandall *v.* Nevada (1867) 6 Wall. 35, by Miller, J.; tax upon spirituous liquors in Hinson *v.* Lott (1869) 8 Wall. 148, Miller, J.; tax per ton of freight carried by railroads, canals, etc.; in Case of the State Freight Tax (1873) 15 Wall. 232, by Strong, J.; state tax on railroad gross receipts, in Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania (1887) 122 U. S. 326, by Bradley, J.; tax on pedlars in Welton *v.* Missouri (1876) 1 Otto 275, by Field, J.; foreign immigration in Henderson *v.* Mayor (1876) 2 Otto 259, by Miller, J.; improvement of river and harbor in Mobile *v.* Kimball (1881) 10 Otto 691, by Waite, C. J.; local wharfage dues in Parkersburg & Ohio River Transportation Co. *v.* Parkersburg (1883) 17 Otto 691, by Bradley, J.; tax on coal still in barges in which it had been transported, in Brown *v.* Houston (1884) 114 U. S. 622, by Bradley, J.; tax on ferry company, in Gloucester Ferry Co. *v.* Pennsylvania (1884) 114 U. S. 196, by Fields, J.; tax on liquors, in Walling *v.* Michigan (1886) 116 U. S. 446, by Bradley, J.; "long haul" and "short haul" in Wabash, St. L. & Pacific R. R. Co. *v.* Illinois (1886) 118 U. S. 557, by Miller, J.; bridges, etc., over navigable rivers in Hamilton *v.* Vicksburg, etc., R. R. Co. (1886) 119 U. S. 280, by Field, J.; tax and license for drummers in Robbins *v.* Taxing District of Shelby County (1887) 120 U. S. 498, by Bradley, J.; sale of liquors, in Leisy *v.* Hardin (1890) 135 U. S. 100, by Fuller, C. J.; railway express trains, in Lake Shore & Michigan Southern Railway Company *v.* Ohio (1899) 173 U. S. 285, by Harlan, J.

"The grant of commercial power to Congress does not contain any term which expressly excludes the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress, requires that a similar authority shall not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to interdict them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this Court, after the most deliberate consideration, to hold that the mere grant of such power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the State may legislate in the absence of Congressional regulations (Sturges *v.* Crowninshield, 4 Wheat. 193; Moore *v.* Houston, 5 Wheat. 1; Willson *v.* Black Bird Creek Marsh Co. 2 Peters 351). * * *

"But when the nature of a power like this is spoken of, when it is said that the nature of the power require that it shall be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

"Either absolutely to affirm, or deny that the nature of this power requires exclusive regulation by Congress is to lose sight of the nature of the subjects of the power, and to assert concerning all of them, what is really applicable but to a part. *Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a character as to require exclusive regulation by Congress.* That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress that the nature of this subject is such, that until Congress should find it necessary to exert its power it should be left to the legislation of the States; *that it is local and not national; that it is likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits,* * * * and the nature of the subject when examined is such as to leave no doubt of the superior fitness and propriety, not

to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is, in any case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, *while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States in conformity with the circumstances of ports within their limits.* In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power what is not true of its subject now in question."

Though Judge Curtis' rules were a great advance beyond the confusion before existing, yet they do not ascertain nor does the opinion give the clue to determining, what subjects are in their nature national or admit only of one uniform system of regulation and what are in their nature local, or admit of different systems of regulation according to local conditions. Therefore their application has been difficult, and the justices of the Supreme Court have differed much as to whether a given subject were of national or of local character, as is shown by several of the cases cited in note 12. The practical application of the rules will, it is believed, be much facilitated by resort to the supplementary rules or principles below stated, which are deduced from the following considerations:

"Commerce" in the Constitution is a term of largest import. It comprehends intercourse for the purpose of trade in all its forms, including the transmission of intelligence, the transportation by land and water of persons and commodities, and the purchase, sale and exchange of the commodities.[1] "Commerce" is the transaction—the transmission, the transportation, the negotiation and sale; it is plainly distinct from its incidents—the subject, agent or instrument of the commerce. A commodity may be its

[1] Gibbons *v.* Ogden (1824) 9 Wheat. 1; Welton *v.* Missouri (1875) 1 Otto 275; Pensacola Tel. Co. *v.* W. U. Tel. Co. (1878) 6 Otto 1.

subject, a railroad car its instrument, an employee of a common carrier its agent, but it is clear none of these is commerce *per se*. Now this last, commerce, is of national character, for being general in its very nature, diversity and conflict of local regulations by different States or communities would render its free and equal prosecution within the nation impossible. But its incidents, the commodity, the instrument, the personal agent, are in their nature local, constituting a part of the property and persons within the respective States, over which, even during their connection with a transaction of interstate or foreign commerce, the States must necessarily retain control, if local self-government and the autonomy of the States are not to become mere names.[1]

But, though these incidents of commerce are local in their nature, and are not in themselves commerce, yet the connection between them and commerce is so close that their regulation by the States may constitute such a burden upon commerce as contravenes the Constitution.

By judicial determination it has been settled that a tax upon a commodity or instrument of inter-state or foreign commerce, during its connection therewith and as an incident thereof,[2] and a tax upon a person by way of license or the like for the privilege of conducting such commerce,[3] are taxes upon the commerce; and both upon principle and by authority it is determined that a discrimination by a State against the commodities, instruments or agents of commerce from other States or countries is as effectually a burden upon that commerce as if the discrimination were

[1] The point stated in the text is distinct from that held in several cases, that before a transaction of foreign or inter-state commerce begins, and after it ends, the commodity being merged in the general mass of property in the State, and not being during these periods the subject of such transactions, may be regulated by State laws: Brown *v.* Houston (1885) 114 U. S. 622; Coe *v.* Errol (1886) 116 U. S. 517; Pittsburg and S. Coal Company *v.* Bates (1895) 156 U. S. 577. The point in the text is, that *even during the continuance of their connection with the inter-state or foreign commerce transaction,* the incidents of commerce continue under State control, subject to the principles stated below.

[2] Brown *v.* Maryland (1827) 12 Wheat. 419; Low *v.* Austin (1871) 13 Wall. 29; Case of the State Freight Tax (1873) 15 Wall. 232; Morgan *v.* Parham (1873) 16 Wall. 471.

[3] Welton *v.* Missouri (1876) 1 Otto 275; Robbins *v.* Taxing Dist. Shelby County (1887) 120 U. S. 489.

directed against the commerce *per se*.[1] It is also clear that if no limit, proportional to the due protection and control of persons and property within their jurisdiction, were imposed upon the regulation of the incidents of commerce by the States, then by easy devices, under plea of police or other powers, the States could by legislation, proper in kind, but excessive in degree, greatly burden, or even totally bar competitive trade from other States or foreign countries. Therefore it is further determined, both upon principle and by authority, that the regulation by the States of the incidents of commerce shall not exceed the fair requirements of each case.[2]

From these considerations result the following rules in explanation of and supplemental to those of Cooley *v.* Board of Wardens, above given :

Commerce with foreign nations and among the several States, being in its nature national, its direct regulation is exclusively in the power of Congress.

The incidents of such commerce,—the commodity, instrument, agent,—being local in nature, their regulation is generally within the power of the State, in the absence of conflicting legislation by Congress, except when the State regulation (1) imposes a tax upon an incident of that commerce in its quality as such, or (2) is discriminating, or (3) exceeds what is reasonably necessary to the protection of persons or property and to orderly government within the State.

While these rules have not been stated in any case, they are deduced from examination of all the cases in the Supreme Court, and are supported by many which were decided upon their principles, if without statement of the rules.[3] By reciting the qualities of the subject-matter

[1] Cook *v.* Pennsylvania (1878) 7 Otto 566; Guy *v.* Baltimore (1880) 10 Otto 434; Minnesota *v.* Barber (1890) 136 U. S. 313; see Woodruff *v.* Parham, 8 Wall. 123, and Hinson *v.* Lott, 8 Wall. 148, both decided in 1869.

[2] Chy Lung *v.* Freeman (1876) 2 Otto 275; Brimmer *v.* Rebman (1891) 138 U. S. 78; Hannibal & St. Jo. R. R. Co. *v.* Husen (1878) 5 Otto 465.

[3] The following cases will illustrate how the principles of these rules have been applied by the Supreme Court: Direct Regulation of Commerce Exclusively in Power of Congress: Case of the State Freight Tax (1873) 15 Wall. 232; Welton *v.* Missouri (1876) 1 Otto 275; Henderson *v.* Mayor (1876) 2 Otto 259; Hall *v.* de Cuir (1878) 5 Otto 485; Cooper *v.* Ferguson (1885) 113 U. S. 727; Wabash, St. L. & Pac. R. R. Co. *v.*

Illinois (1886) 118 U. S. 557; Robbins *v.* Taxing Dist. Shelby Co. (1887) 120 U. S. 489; W. U. Tel. Co. *v.* Pendleton (1887) 122 U. S. 347; Bowman *v.* Chicago & N. W. R. R. Co. (1888) 125 U. S. 465; Leisy *v.* Hardin (1890) 135 U. S. 100; Lyng *v.* Michigan (1890) 135 U. S. 161; Rhodes *v.* Iowa (1898) 170 U. S. 412; Vance *v.* Vandercook (1898) 170 U. S. 438; Hanley *v.* Kansas City S. Ry. Co. (1903) 187 U. S. 617; Louisville & N. R. Co. *v.* Eubank (1902) 184 U. S. 27.

State law Void Because of Conflict with Law of Congress: Gibbons *v.* Ogden (1824) 9 Wheat. 1; Brown *v.* Maryland (1827) 12 Wheat. 419; Sinnott *v.* Davenport (1859) 22 How. 227; Pensacola Tel. Co. *v.* W. U. Tel, Co. (1878) 6 Otto 124; People of State of New York *v.* Compagnie Transatlantique (1883) 17 Otto 59; Gulf, Colorado & Santa Fe Ry. Co. *v.* Hefley (1895) 158 U. S. 98.

State Tax on Incidents of Interstate and Foreign Commerce, Invalid: Hays *v.* Pacific Mail S. S. Co. (1854) 17 How. 596; Case of the State Freight Tax (1873) 15 Wall. 232; Morgan *v.* Parham (1873) 16 Wall. 471; Welton *v.* Missouri (1876) 1 Otto 275; W. U. Tel. Co. *v.* Texas (1882) 15 Otto 460; Moran *v.* New Orleans (1884) 112 U. S. 69; Pickhard *v.* Pullman Southern Car Co. (1886) 117 U. S. 34; Corson *v.* Maryland (1887) 120 U. S. 502; Leloup *v.* Mobile (1888) 127 U. S. 640; Stoutenburgh *v.* Hennick (1889) 129 U. S. 141; Low *v.* Austin (1890) 13 Wall. 29; Harman *v.* Chicago (1893) 147 U. S. 396; Brennan *v.* Titusville (1894) 153 U. S. 289.

State Tolls on Interstate Bridge, Void: Covington etc. Bridge Co. *v.* Kentucky (1894) 154 U. S. 204.

Tax on Foreign Corporation for Doing Interstate Business in State, Invalid: Gloucester Ferry Co. *v.* Pennsylvania (1885) 114 U. S. 196; McCall *v.* California (1890) 136 U. S. 104; Norfolk & Western R. R. Co. *v.* Pennsylvania (1890) 136 U. S. 114.

Tax on Receipts from Interstate Traffic, Void: Fargo *v.* Michigan (1887) 121 U. S. 230; Philadelphia & S. Mail S. S. Co. *v.* Pennsylvania (1887) 122 U. S. 326.

Tax on Interstate Telegraph Messages Void: W. U. Tel. Co. *v.* Alabama (1889) 132 U. S. 472.

State Law Invalid Because of Discrimination: Ward *v.* Maryland (1871) 12 Wall. 418; Cook *v.* Pennsylvania (1878) 7 Otto 566; Guy *v.* Baltimore (1880) 10 Otto 434; Tiernan *v.* Rinker (1880) 12 Otto 123; Webber *v.* Virginia (1881) 13 Otto 344; Walling *v.* Michigan (1886) 116 U. S. 446; Spraigue *v.* Thompson (1886) 118 U. S. 90; Minnesota *v.* Barber (1890) 136 U. S. 313; Brimmer *v.* Rebman (1891) 138 U. S. 78; Voight *v.* Wright (1891) 141 U. S. 62; see also the reasoning of the Court in Woodruff *v.* Parham (1868) 8 Wall. 123, and Hinson *v.* Lott (1868) 8 Wall. 148, before cited.

State Law Invalid as Exceeding Necessities of the Case: Southern S. S. Co. *v.* Portwardens (1867) 6 Wall. 31; Chy Lung *v.* Freeman (1876) 2 Otto 279; Hannibal & St. Jo. R. R. Co. *v.* Husen (1878) 5 Otto 465; Foster *v.* Master & Wardens New Orleans (1897) 4 Otto 246; Schollenberger *v.* Pennsylvania (1898) 171 U. S. 1; Collins *v.* New Hampshire (1898) 171 U. S. 30; Cleveland, Cin., Chicago & St. Louis Ry. Co. *v.* Illinois (1900) 177 U. S. 514; Cleveland, Cin., Chicago & St. L. Ry. Co. *v.* Jett (1900) 177 U. S. 514.

See also Reagan *v.* Farmers Loan & Trust Co. (1894) 154 U. S. 362; Plumley *v.* Massachusetts (1894) 155 U. S. 461; Western Union *v.* James (1896) 162 U. S. 650; Rasmussen *v.* Idaho (1901) 181 U. S. 198; Smith *v.* St. Louis & S. W. R. Co. (1901) 181 U. S. 248.

Discussion of cases sustaining the power of the States to regulate incidents of commerce is reserved to another article.

upon which their application severally depends they facilitate the use of Judge Curtis' rules by diminishing the difficulty of deciding in what class a given subject belongs.

The inaction of Congress upon subjects which are within its exclusive power of regulation is an indication that as to them commerce shall be free, and State regulation is an unconstitutional interference with that freedom.[1] Therefore the State cannot derive from its admitted powers, such as taxation and police, a right to regulate them,[2] nor does the absence of discrimination from State legislation validate the legislation. For neither power of the State to legislate upon other subjects, nor equality of its legislation, can make good the constitutional lack of power to directly regulate inter-state and foreign commerce.

An early decision of the Supreme Court[3] held that the commercial power of Congress extended to the punishment of offenses by private parties which interfered with, obstructed or prevented inter-state or foreign commerce. Recent decisions of the Court indicate a tendency to extend this principle to the proposition that the power of Congress to directly regulate that commerce is exclusive of interference, not only by the States, but by private individuals; to affirm that private contracts and combinations, as well as State legislation, may be repugnant to the exclusive grant to Congress, and herein to find additional support for the constitutionality of laws of Congress, such as the Sherman Anti-Trust Act, which restrict the right of private contract.[4] And other late cases have established the doctrine of one of the earliest and most remarkable decisions rendered on this topic,[5] that the power of Congress to regulate commerce is not limited to the enactment of measures which promote commerce, but is an instrument to effect

[1] Welton *v.* Missouri (1875) 1 Otto 275; Robbins *v.* Taxing Dist. Shelby Co. (1887) 120 U. S. 489; Leisy *v.* Hardin (1890) 135 U. S. 100.

[2] Bowman *v.* Chic. & N. W. Ry. Co. (1888) 125 U. S. 465; Hannibal & St. Jo. R. R. Co. *v.* Husen (1877) 5 Otto 465; Minnesota *v.* Barber (1890) 136 U. S. 313; Robbins *v.* Shelby Co. Taxing Dist. (1887) 120 U. S. 489.

[3] U. S. *v.* Coombs (1838) 12 Peters, 72.

[4] Addystone Pipe & S. Co. *v.* U. S. (1899) 175 U. S. 211; U. S. *v.* Joint Traffic Assoc. (1898) 171 U. S. 505; Northern Securities Co. *v.* U. S. (1904) 193 U. S. 197.

[5] U. S. *v.* Brig William (1808) 2 Hall's Law Journal 255.

other national purposes, and therefore includes the power to prohibit commerce in the interest of great national ends and the public morals.[1] By these decisions, the cycle of the development of the commercial power of Congress is, so to say, completed; this power having been first decided to be superior to the power of the States to regulate their internal affairs, then to be exclusive of the States over large divisions of the subject, and finally to include the prohibition of the commerce to protect which it was granted by the Constitution.

DAVID WALTER BROWN.

NOTE ON THE CASE OF THE UNITED STATES *VERSUS* THE BRIGANTINE WILLIAM.[2]

This case decided in the United States District Court for the District of Massachusetts, in 1808, by Hon. John Davis, District Judge, has received less attention than it merits. It raised the question of the constitutionality of the Embargo Acts of 1807, 1808, and required the Court to pass upon (1) the powers of the judiciary to declare unconstitutional an Act of Congress; (2) the extent of the powers of Congress under the commerce clause of the Constitution. According to my inquiries, it was one of the earliest decisions on the former question, and the first in any court to consider the second question at large, the case of The Ulysses, in 1800 (Fed. Cases, No. 14330) which preceded it, and in which Mr. Davis had represented the United States as District Attorney, having only touched upon the question as incidental to a prosecution for felony. Judge Davis therefore had no precedents to guide him, but developed the power of Congress over commerce upon principle, with a prevision and breadth of judgment, which are scarcely inferior to Chief Justice Marshall's in his great cases. Indeed I cannot doubt that when Marshall rendered the decision in Gibbons *v.* Ogden he had before him, or was familiar with, Judge Davis opinion of sixteen years earlier.

Judge Davis reached the conclusion that the Embargo Acts were constitutional because the power of Congress to regulate inter-state and foreign commerce included the power to prohibit commerce in some degree,—in his phrase to "abridge it." A synopsis of his reasoning may be made thus:

Commerce is one of the objects as to which the Constitution creates a national sovereignty, which as to those objects, is limited only by the qualifications and restrictions expressed in the Constitution. It is contended that the power to regulate commerce implies a limitation, and cannot be understood to give a power to *annihilate;* but the Embargo Acts do not operate as a prohibition of *all* foreign commerce. Partial prohibitions are

[1] The Lottery Cases (1903) 188 U. S. 321.

[2] (1808) 2 Hall's *American Law Journal*, 255.

authorized by the expression of the Constitution, and the degree or extent of the prohibition is to be adjusted by the discretion of the national government, to which the subject is committed. Under the power to make all laws *necessary* and *proper* for carrying into execution the enumerated powers, Congress may consider the present prohibitory system as *necessary* and *proper* to an eventual beneficial regulation. The *policy* of the expedient is not for the court. The power of Congress to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself, but is also to be considered as an instrument for other purposes of general policy and interest, and the sphere of legislative discretion must be correspondingly extended. That no definite term for the continuance of the prohibition is stated is not an objection, for this indefiniteness may be essential to its efficacious operation, and the authority given to the President to suspend the Acts is evidence that they are not intended to be perpetual. If an embargo or suspension of commerce of any description be within the powers of Congress, the terms of the measure must also be within their discretion. Before the Constitution, the power to prohibit commerce was in the State legislatures, and unless Congress possesses it under the Constitution it must still exist in them; but this has never been claimed, and the exercise of such a power by the States would be inconsistent with the power vested in Congress to regulate commerce. Hence this power, which was reserved to the States by the Articles of Confederation, has been surrendered to Congress by the Constitution.

Judge Davis, born in 1761 and dying in 1847, was for more than forty years Judge of the United States District Court, having been appointed by President Adams and retired in 1841 amid great manifestations of respect by the Bar. He had been a member of the Massachusetts convention which adopted the Constitution, and Comptroller of the Treasury and United States District Attorney under Washington. In an obituary notice of him by Mr. George S. Hilliard it is said: "Only those members of the bar who have practised before him, could know the soundness of his legal judgment, his accurate learning, his conscientious fidelity to every case that came before him, and the unerring instinct that led him always to the right conclusions and by the right path. He gave a memorable instance of his judicial firmness, by his judgment in favor of the constitutionality of the embargo."

DAVID WALTER BROWN.